

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

94-108

PR File No. 94-SP6

In the Matter of

IMPLEMENTATION OF SECTIONS 3(n)
AND 332 OF THE COMMUNICATIONS
ACT: REGULATORY TREATMENT OF
MOBILE SERVICES

Petition To Extend Rate Regulation
Filed by the New York State
Public Service Commission

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard") submits these comments in response to the petition of the New York State Public Service Commission ("NYPSC") for authority to continue regulating the rates of commercial mobile radio service ("CMRS") providers operating in New York. Vanguard provides cellular services throughout the eastern United States, including in New York State. For the reasons set forth below, the NYPSC failed to file a legally sufficient petition by the statutory deadline for the filing of state petitions to continue regulation of CMRS rates, and the Commission therefore should dismiss its petition.

Both the statutory and Commission provisions governing the filing of state petitions to continue regulating CMRS rates are unambiguous. Section 6002(c)(3)(A) of the

Omnibus Budget Reconciliation Act of 1993 (the "Act")^{1/} amended 47 U.S.C. § 332(c)(3) to preempt state and local governments from regulating "the entry of or the rates charged by" any CMRS providers. Section 6002(c)(3)(B) of the Act also provides that those states that were regulating CMRS rates on June 1, 1993 had until August 10, 1994 to petition the Commission for authority to continue to regulate rates. Their petitions must demonstrate that:

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;
or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.^{2/}

In the Second Report and Order implementing these sections of the Act, the Commission adopted rules clearly specifying the procedures that states were to follow in filing petitions.^{3/} Under the Commission's procedures, a state petition "should be acceptable only if the state agency making such filing certifies that it is the duly authorized state agency responsible for the regulation of telecommunications services provided in the state."^{4/} The Commission's rules further provide that states must submit "[d]emonstrative

^{1/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 6002(b)(2)(A), (b)(2)(B), 107 Stat. 312, 392 (1993).

^{2/} Act § 6002(c)(3)(A).

^{3/} See Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1501-07, corrected by erratum, 9 FCC Rcd 2156 (1994) (adding 47 C.F.R. § 20.13).

^{4/} Id. at 1504; see also 47 C.F.R. §§ 20.13(a)(3), (b)(1).

evidence" to justify a claim that prevailing market conditions will not protect subscribers from unjust rates.^{5/} The Commission's rules specifically mention certain categories of evidence as being "pertinent," including the number of different CMRS providers in the state, the customer base of each provider, rate information for each provider, an assessment of the substitutability of CMRS services, opportunities for new entrants, specific allegations of anticompetitive or discriminatory conduct supported by affidavits, evidence of systematic rate discrimination, and information regarding consumer satisfaction.^{6/} In addition, petitions "must identify and describe in detail the rules the state proposes to establish if the petition is granted."^{7/} The rules also provide that states bear the burden of proof.^{8/}

The NYPSC's petition does not satisfy these requirements, and the petition therefore is unacceptable under the Commission's rules. First of all, the NYPSC has not submitted the required certification of its responsibility for regulation. The Commission's rules plainly require certifications to be separately executed statements either in the form of affidavits or declarations subscribed by the declarant under penalty of perjury.^{9/} The NYPSC only has alleged in the text of its petition that it is the authorized state agency responsible for regulating intrastate telecommunications services in New York (NYPSC Pet. at 1), and that statement is inadequate under the Commission's rules.

^{5/} 47 C.F.R. §§ 20.13(a)(1), (b)(1).

^{6/} Id. §§ 20.13(a)(2), (b)(1).

^{7/} Id. §§ 20.13(a)(4), (b)(1).

^{8/} Id. §§ 20.13(a)(5), (b)(1).

^{9/} See id. § 1.16.

Second, the NYPSC has not submitted any demonstrative evidence to justify its claim that prevailing market conditions will not protect subscribers from unreasonable rates. To the contrary, the NYPSC relies solely on unsupported, generalized assertions that rate regulation deters anticompetitive and discriminatory practices and that, with only two cellular providers in each market, CMRS services cannot be competitive. Its "evidence" is its admission that recently cellular rates have decreased (NYPSC Pet. at 8), its claim that cellular providers' higher returns on equity than traditional regulated landline companies "suggest that there is the potential for rates to become unjust" (NYPSC Pet. at 9), its assertion that the fact that the market share held by the two providers in each market is not always equal "may indicate" that the company with the larger market share "could have the incentive and opportunity to engage in anticompetitive pricing" (NYPSC Pet. at 9), and its concession that consumer complaints remain low (NYPSC Pet. at 9-10). Moreover, the NYPSC's description of two alleged improper practices is insufficient under the Commission's rules, because those descriptions are unaccompanied by the required affidavits.^{10/}


Third, the NYPSC fails to identify the rules that it would apply to CMRS providers in New York, much less provide a detailed description of those rules as the Commission requires.

^{10/} In any event, the NYPSC could not satisfy its burden of proof that continued regulation of CMRS rates is necessary. As demonstrated by the economic showings of McCaw Cellular Communications, Inc. and the Cellular Telecommunications Industry Association filed in this proceeding, which Vanguard endorses, prevailing market conditions in fact lead to competitive CMRS rates in New York.

For these reasons, the NYPSC failed to file a legally sufficient petition by the statutory deadline for doing so, and the Commission therefore should dismiss the petition.

Respectfully submitted,

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September 19, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of September, 1994, caused copies of the foregoing "Comments of Vanguard Cellular Systems, Inc." to be served by first class mail, postage prepaid, on the following:

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